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CURRENT TOPICS.

In another column we print a communication from a distinguished jurist and law writer, approving the views which we have recently expressed on the subject of journalistic criticism of judicial acts. Though our opinion on the subject is too thoroughly fixed to need confirmation, yet such backing is a gratification to our self-esteem.

As a further illustration of our views, we add here a communication from a correspondent in Indiana, which seems to us to be just and temperate, and at the same time quite severe:

To the Editor of the Central Law Journal:

The opinion of the Texas Court of Appeals in the case of Wooldridge v. State, appears in full in the last number of the CENTRAL LAW JOURNAL. We surmise it was so inserted for the purpose of calling attention to the fallacies and unsound reasoning sometimes indulged in by appellate courts, when they attempt to justify the reversal of judgments of *nisi prius* courts for trivial causes. The opinion in the case alluded to is a forcible illustration of this vicious practice, which occurs too frequently, and is tending to educate the public to distrust and ridicule judicial methods, and to increase the jurisdiction and victims of "lynch law."

The learned judge who delivered the opinion of the court in the case, argues many points that do not enter into a fair consideration of the point involved upon which the judgment of reversal is predicated. A false question is assumed as being the vital one involved, and reasons are advanced and authorities cited to demonstrate that this false issue is untenable. The opinion labors to show that under "statutory and legal rules," a verdict finding a person guilty of murder, without also finding the degree, is insufficient. This "man of straw" which the court sets up for the purpose of "knocking down," was not the real question presented for decision. The real question was, did the verdict in question find the degree of guilt? What is said about the requisites of a verdict is correct, but not being directly involved, only serve to stretch out the opinion to an unnecessary length.

The three requisites of a verdict, as stated, 1st, that it must declare the issues; 2d, must be in writing; 3d, and must be concurred in by all the jurymen, will not be controverted, and no argument or citation of authorities was necessary in support of it. The verdict in question complied with all these requisites. The issue was guilty or not guilty, and it was properly declared; it was in writing, and all the jurymen concurred in it. But it is stated that the statute declares, "if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree." The verdict in question was not void in view of this statute, and only needed the aid of a little "common sense" to make it clear. The degree was found, and a word was only mis-spelled. The learned judge says "that neither bad spelling nor ungrammatical findings of a jury will vitiate a verdict when the sense is clear." Five cases decided by his own court are cited in support of this. Now in this case, the sense and meaning of the jury was perfectly clear and the verdict subject to criticism only in consequence of the misspelling of a word. The learned judge says that this presents "a most serious question and no case directly in point has been found in our own or the decision of other courts of the country." This showing is creditable to his own and the other courts. But again he says "we must determine it by a fair and proper construction of our statutes, relating to the subject matter by analogies drawn from well settled principles of the law." If this be so, why not be governed by "*stare decisis*" that bad spelling will not vitiate a verdict, according to the authorties cited. A misspelled word was all that hurt this verdict. It is also stated in the opinion that "it was evidently read '*first degree*' by the clerk and assented to by the jury as read." The trial court had passed upon this question, and every presumption of law and fact was in favor of the sufficiency of the verdict and only a misspelled word against it, which did not obscure the sense of the jury or nullify it according to the authorities cited. To nullify this verdict it was necessary for the appellate court to ignore the fact that it was read by the clerk, in proper form, assented to by all the jurymen as read and acted upon by the court below, and still more to torture and construe into nonsense the verdict of a jury, harmonious in all its parts, with the exception of a misspelled word. But the Appellate Court did all this and nullified the verdict. This is not the way constitutions, statutes or any kind of instrument is dealt with by courts and the analogies of the law appealed to by the learned judge do not sustain him in thus dealing with the verdict of a jury. It is to be regretted that appellate courts are so prone to interfere with the judgment of the trial courts upon mere technicalities that are as baseless as "the fabric of a vision."

H. S. C.

Vincennes, Ind., April 20, 1883.

THE RIGHT OF A BONA FIDE OCCUPANT OF LAND TO COMPENSATION FOR HIS IMPROVEMENTS.

It may be observed, in the first place, that the civil law afforded protection to the *bona fide* occupant of land, who had made useful or permanent improvements on the land, believing himself to be the true owner. The civil law never permitted one who was in the possession of land in good faith, to be turned out of his possession by the rightful owner, without any compensation for the additional value he has given to the soil by the improvements he had made; but it allowed him to offset the value of his improvements to the extent, at least, of the rents and profits claimed.[1] He was not entitled to compensation for all his expenditures upon the estate,

[1] Sandar's Justinian (Hammond's ed.) 175.

but only for such as had enhanced its value.[2] This principle, too, was adopted into the law of those modern nations whose jurisprudence was derived from the Roman law: into that of France,[3] and Spain,[4] and Scotland. [5]

At the common law, however, the rule was different. The policy of that law was averse to making any allowance to the *bona fide* occupant of land for the improvements he might have made upon the land; and this was upon the theory that the true owner was under no legal or moral obligation to pay for improvements which he had never authorized to be made, and which originated in wrongful occupancy. Accordingly, the improvements were considered as annexed to the freehold, and as passing with it. Consequently, when the owner recovered in ejectment, he was not subjected to the condition of paying for any improvements which might have been made upon the land by the occupant. And it was immaterial that the occupant was in possession in good faith, under color of title, believing himself to have the title to the land. As against the true owner, he was an intruder, a wrong-doer, who was not entitled to any compensation whatever for his improvements, which passed with the land to the owner upon a recovery in ejectment. [6]

It was well settled, however, that in case the true owner of an estate, after a recovery thereof at law from a *bona fide* purchaser for a valuable consideration without notice, sought an account in equity, as plaintiff, against such possessor, for the rents and profits, the possessor so sued might recoup from the rents and profits the full amount of all the meliorations and improvements which he had beneficially made upon the estate. So, where one held merely the equitable title, and sought the aid of the equity court to enforce it, it was settled that the court would administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements.[7] But an entirely different question was presented when the *bona fide* purchaser himself came into equity asking for affirmative relief against the true owner, after he had recovered the premises at law. The right to grant such affirmative relief was considered by Chancellor Walworth in the New York Court of Chancery in 1837. It was disposed of as follows: "I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle in its application to future cases might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this State, for the purpose of giving the *bona fide* possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery suit in all such cases." [8]

Four years afterwards the question again came up, and this time in the Circuit Court of the United States for the first circuit, Mr. Justice Story presiding. After alluding to the opinion of Chancellor Walworth, and to his admission that he could find no case in England or America where the point had been decided either way, Mr. Justice Story said:

[2] Dig., lib. 20, tit. 1, l. 29, sec. 2; Dig., lib. 6, tit. 1, l. 65; Id., l. 38. See 2 Story's Eq. Jur., sec. 1237; Putnam v. Ritchie, 6 Paige's Ch. (N. Y.) 390, 403, 404; Bright v. Boyd, 1 Story (U. S.), 478.

[3] Code Napoleon, arts. 552, 555; *Pothier de la Propriete*, n. 343, 353.

[4] Asa & Manuel's Inst. of Laws of Spain, 102.

[5] Bell's Com. on Law of Scotland, p. 139, sec. 538; Ersk. Inst., b. 3, tit. 1, sec. 11.

[6] Reed v. Reed, 68 Me. 568; Clark v. Hornthal, 47 Miss. 434, 476; Blanchard v. Ware, 43 Iowa, 530; Newland v. Baker, 26 Kan. 341, 344; Barton v. Land Co., 27 Kan. 634, 637; Pugh v. Bell, 2 Mon. (Ky.) 129; Clausen v. Rayburn, 14 Iowa, 136, 140; Webster v. Stewart, 6 Iowa, 401; Lunqueet v. Ten Eyck, 49 Iowa, 213; McCoy v. Grandy, 3 Ohio St. 463, 466; Wilson v. Red Wing School District, 22 Minn. 488, 491; McMinn v. Mayes, 4 Cal. 209; Ford v. Holton, 5 Cal. 319; Chesround v. Cunningham, 3 Blackf. (Ind.) 82, 84; Westerfield v. Williams, 59 Ind. 221, 224; Graham v. Connersville, etc. R. Co., 36 Ind. 463, 470; Rainer v. Huddleston, 51 Tenn. 223, 225; Townsend v. Shipp, Cooke (Tenn.), 294; Nelson v. Allen, 1 Yerg. (Tenn.) 360; Bonner v. Wiggins, 52 Tex. 125; Russell v. Blake, 2 Pick. (Mass.) 507.

[7] See 2 Story's Eq. Jur., sec. 799, a, b.

[8] Putnam v. Ritchie, 6 Paige's Ch. 405.

"Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." And after a careful consideration of the subject, he laid down the broad doctrine that so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, had, by his improvements and meliorations, added to the permanent value of the estate, he was entitled to a full remuneration, and that such increase of value was a lien and charge on the estate, which the absolute owner was bound to discharge before he could be restored to his original rights in the land.[9] On the coming in of the Master's report, two years afterwards, this conclusion was adhered to. "It has," said Mr. Justice Story, "the most persuasive equity, and, I may add, common sense and common justice for its foundation."[10] The cases of Henry v. Polland,[11] and Matthews v. Davis,[12] decided in Tennessee, soon followed, and were to the same effect, being based on Judge Story's decision, and it was announced that affirmative relief would be granted to one who went into possession under a parol contract of sale, and made improvements on the land prior to eviction by the vendor. There are cases to the same effect in North Carolina.[13]

This opinion of Mr. Justice Story has been recognized and adopted elsewhere,[14] but has rarely had occasion to be reviewed in this country, owing to statutory regulation of the question, and the opinion has been expressed in a recent case, that in consequence it is difficult to say whether or not it can be regarded as the established law.[15] It can not be denied that where one has gone into the possession of land in good faith, believing himself to be the owner, and has expended money in making permanent improvements which have increased the value of the property, he has a strong natural equity, growing out of his own mistake and the neglect of the true owner, which would seem to entitle him to remuneration to the extent that his improvements have augmented the value of the land. In recognition of this equity, many of the States have adopted what are known as betterment or occupying claimant's acts. These statutes generally provide that after recovery in ejectment, the defendant, being a *bona fide* occupant, shall be entitled to recover of the plaintiff the full value of the improvements made upon the land, which value is to be assessed by a jury, or by commissioners, and to the extent that it is in excess of the *mesne* profits, is made a lien on the land, the payment of which constitutes a condition precedent to a recovery of the possession. The plaintiff has the option of taking possession, by paying the lien, or of receiving in lieu of the land, the sum which may be ascertained to be equitably due him. The constitutionality of these acts has been sustained in a number of decisions, which seem to effectually preclude any further doubt of their legality.[16]

In sustaining the constitutionality of one of these statutes, the court of Vermont so well explained the principle of betterment laws in general, that its repetition, in this connection, is of interest. "The action for betterments, as they are now termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the de-

[9] Bright v. Boyd, 1 Story, 478.
[10] 2 Story, 607.
[11] 4 Humph. (Tenn.) 362.
[12] 6 Humph. (Tenn.) 324.
[13] Albea v. Griffin, 2 Dev. & Bat. (N. C.) Eq. 9; Wetherell v. Gorman, 74 N. C. 603; Hill v. Brower, 76 N. C. 124; Smith v. Stewart, 83 N. C. 406; Wharton v. Moore, 84 N. C. 479, 483.
[14] Hatcher v. Briggs, 6 Oregon 31; Union Hall v. Morrison, 39 Md. 281; Thomas v. Thomas, Ex'r., 16 B. Monr. (Ky.) 421; Bell's Heirs v. Barnett, 2 S. & Mar. (Ky.) 516; Valle's Heirs v. Fleming's Heirs, 29 Mo. 152.
[15] Griswold v. Bragg, 48 Conn. 577, 581.
[16] Griswold v. Bragg, 48 Conn. 577; Ross v. Irving, 14 Ill. 171; Claypoole v. King, 21 Kans. 602, 612; Scott v. Mather, 14 Texas 235; Burke v. Mechanics' Savings Bank, 12 R. I. 513, 515; Whitney v. Richardson, 31 Vt. 306; Pacquett v. Pickness, 19 Wis. 219; Saunders v. Wilson, 19 Texas 194; Hunt's Lessee v. McMahan, 5 Ohio 132; Longworth v. Wolfington, 6 Ohio 10; Fowler v. Halbert, 4 Bibb. (Ky.) 54; Wilson v. Red Wing School District, 22 Minn. 488; Childs v. Shower, 18 Iowa 261; Lessee of Davis v. Powell, 13 Ohio 308; Bodley v. Gaither, 3 Mon. (Ky.) 58; Armstrong v. Jackson, 1 Blackf. (Ind.) 374; Bacon v. Callender, 6 Mass. 308.

fendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been had no labor been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice, if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken from the civil law, where ample provision was made for reimbursing the *bona fide* possessor the expense of his improvements if he was removed from his possession by the legal owner. It gives to the possessor, not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterment thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it and the value if no improvement had been made. If the owner takes the land, together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."[17] Such laws may be unconstitutional, however, by reason of some special and unusual provision, by means of which private rights of property are violated, and the limitations of legislative power are not duly observed. For instance, a provision in such a law requiring repayment to the occupant of the purchase money paid by him for the land, with interest on the same, can not possibly be sustained. It is impossible to support it on the ground upon which reimbursement for improvements rests.[18]

[17] Brown v. Storm, 4 Vt. 37. See too, Cooley's Constitutional Limitations, 485, where this passage is also given.

[18] Madland v. Benland, 24 Minn. 372.

So where the statute confers on the occupying claimant the option, after recovery of the judgment against him for the land, to demand payment from the successful claimant of the full value of his permanent improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. Such an option may be granted to the successful claimant, but can not be upheld when conferred on the occupying claimant,[19] and in no case can the legislature constitutionally make the value of the improvements a personal charge against the owner of the land and authorize a personal judgment against him.[20]

It is doubtful whether a betterment act, such as we have been considering, can constitutionally be made to apply to improvements made before its passage. If such improvements by the common law belong to the owner of the soil at the time they are made, his rights thereto would seem to be such a vested right of property as falls within the protection afforded by the constitution. In Society, etc. v. Wheeler,[21] Mr. Justice Story held that such a law could not constitutionally be made applicable to improvements made before its passage. Mr. Justice Cooley, on the other hand, in his Constitutional Limitations,[22] points out that this decision was made under the New Hampshire constitution, which forbade retrospective laws, and adds: "The principles of equity, upon which such legislation is sustained, would seem not to depend upon the time when the improvements were made.[23] But in Burke v. Mechanics' Savings Bank,[24] the above passage from Mr. Justice Cooley's Limitations is quoted, and the court says: "We can not assent to the reasoning. Morally, it may be as wrong for the owner of the land to become the owner of the improvements before as after the law; but before the law it is legally his right to become its owner, and therefore to make him pay for it by re-

[19] McCoy v. Grandy, 3 Ohio St. 463, 467; Childs v. Shower, 18 Iowa 261.

[20] Childs v. Shower, 18 Iowa 261. "Such a law is unprecedented. It has neither reason, necessity, nor precedent to support it. It tramples under foot the constitutional rights of property and of the citizen." Per Dillon, J.

[21] 2 Gall. (U. S.) 105.

[22] p. 486 (4th ed).

[23] See Davis v. Powell, 13 Ohio 308.

[24] 12 R. I. 513, 515.

trospective legislation is to make him pay another for his own property, and thus in effect to deprive him of his own property without due process of law."

It is to be noted in conclusion, that an Indian owner of lands, holding the same under a treaty with the government of the United States, in regard to Indian lands within the State, can not be compelled to pay for improvements in accordance with the provisions of a betterment act enacted by the State.[25] And this is upon the principle that where there is a conflict between the law of the State and a treaty of the United States, the former must give way. But this immunity of the Indian owner is adjudged to be a personal privilege, and the grantee of such owner succeeds only to the title to the land, and is regarded as having no better right to improvements made by an occupying claimant than any other owner of the land would have.[26]

HENRY WADE ROGERS.

[25] Maynes v. Veale, 20 Kans. 374.
[26] Krause v. Means, 12 Kans. 335.

RIGHT OF A PARTY WHEN HIS OWN WITNESS HAS MADE PREVIOUS CONTRADICTORY STATEMENTS.

If in his testimony a witness contradicts statements made by him before he takes the stand, what is the right of the party producing him?

In considering the question, regard must be had to the well settled rule, that one can not impeach his own witness,[1] and its exception, that a party may prove his case, although the evidence incidentally contradict and impeach a witness whom he produced.[2]

First. May the previous contradictory statements be proved?

The English Rule.—There was much contrariety of opinion when the question was first presented to the courts of England, and judges and counsel debated the proposition at length. In Ewer v. Ambrose,[3] a witness having been called by the defendant to prove a partnership between himself and defendant, and, having denied that fact, an answer of the witness in chancery, wherein he admitted himself to be the defendant's partner, was offered in evidence by the latter, and admitted. The court charged the jury to determine the issue in the case according to the credit they might give witness' answer in chancery or his testimony in court. The jury having found for the defendant, the Court of King's Bench directed a new trial, for the reason that the evidence could not be received to substantiate a fact, but, if admissible at all, only to contradict the witness. As to the latter proposition, one of the judges held in the negative, a second refrained from expressing any opinion, and the third intimated that the witness' answer in chancery would be proper evidence to destroy his credit as to the particular fact to which he swore. In Bernasconi v. Fairbrother,[4] Lord Denman, C. J., permitted one of the parties to prove that his witness, immediately before the trial, had made a statement quite opposite to his testimony. The same judge allowed the prior opposing declarations of a witness to be shown by the party who called him in Wright v. Beckett,[5] with the modification that they were not to be considered by the jury as substantive evidence in the case, but only as neutralizing the effect of the testimony the witness had unexpectedly given in court. But on motion for new trial, Lord Denman, C. J., and Bolland, B., considered the question and delivered their judgments at length; the former retaining his first opinion, and the latter holding adversely. The same ruling was made by Lord Denman, C. J., in Dunn v. Aslett.[6] In King v. Oldroyd,[7] the twelve judges unanimously held it proper to prove that a witness in a murder trial had made statements before the coroner contrary to her testimony at the trial.

But the principle affirmed by the cases cited was disapproved. In Holdsworth v. Mayor of Dartmouth,[8] Parke, B., refused to

[1] 2 Phil. Ev. (10th ed.) 982; 2 Best Ev. (Morgan's ed.), sec. 645; 1 Greenl. Ev. (Redf. ed.), sec. 442; 1 Whart. Ev. (2d ed.) 549.
[2] Richardson v. Allen, 2 Stark. 334; Bradley v. Ricando, 8 Bing. 57; Wright v. Beckett, 1 Mo. & R. 414; Brown v. Bellows, 4 Pick. 178; People v. Safford, 5 Denio, 112; Rockwood v. Poundstone, 38 Ill. 199; Skipper v. State, 59 Ga. 63; United States v. Watkins, 3 Cranch C. C. 441; Brown v. Wood, 19 Mo. 475.
[3] B., B. & C., 749.
[4] 1 Mood. & R. 427.
[5] 1 Mood. & R. 414.
[6] 2 Mo. & R. 122.
[7] R. & R., C. C. R. 88.
[8] 2 Mo. & R. 153.

allow the defendant to prove a previous contradictory statement made by his own witness, for the reason that the effect and object of such evidence would be to discredit the witness. Erskine, J., was of the same opinion in Wimer v. Brett,[9] although Wright v. Beckett was cited. The question was finally determined in the negative.[10] But the privilege is now allowed under the Common Law Procedure Act, 17 & 18 Vic. 125, which provides, that, by leave of the court, a party may prove that his own witness has made at other times a statement inconsistent with his testimony.

The Rule in the United States.—Mr. Greenleaf, in his work upon Evidence,[11] stated that "the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify," and that the danger of "its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory declarations are proved by the adverse party." At the time of the author's writing, the weight of authority was the opposite he stated it to be; and such is apparent from his own citations. The text was in accord with the earlier English cases, three of which the author cited.[12] Three of the English cases,[13] which disaffirmed the former rule, were cited by him, as also by Mr. Phillipps,[14] who had declared the weight of modern authority to oppose the doctrine, in which Mr. Best[15] afterwards acquiesced. The author cited four American cases as supporting his text. The question came up directly in one,[16] and was decided in the affirmative, but without any convincing reasoning; and the court, to support its opinion, cited two cases[17] in which it had been held that a party may prove his case, although by so doing he incidentally contradict and impeach his own witness; and that was the sole issue in them. Another[18] was a criminal case, in which it was given as the opinion of the court, that it was proper to allow the Solicitor-General to prove a declaration of the State's witness inconsistent with her testimony at the trial, the judges and counsel for both parties agreeing that the rule in civil cases was different, and admitting that after search, no authority could be found on which to base the conclusion allowing the right in criminal trials. Of the other two cases, one[19] contained the sole issue of impeaching a witness called by the opposing party, by proving prior contradictory statements; and in the other,[20] whether a party could prove his case, although it would necessarily contradict and impeach his own witness, was the issue, and was decided in the affirmative. Of two cases not named by Mr. Greenleaf, one[21] is to the effect that it is proper to prove the contradictory statements; the other,[22] that the privilege should be denied. But if there ever was any doubt as to the question in this country, it does not exist now; for the matter is well settled in the negative.[23]

A distinction is made where a party voluntarily calls a witness and where the law imposes the obligation of establishing a fact by a certain person, such as a subscribing witness. In the latter case, it is held that the previous contradictory statements of the witness may be proved;[24] and for the reason that one so called is not the witness of the party by whom he is produced, provided his examination be confined to that which the law compels shall be proved by him.[25] In some of the States, the right to prove the

9 2 Mo. & R. 357.

10 Allan v. Hutchins, 2 Mo. & R. 358; Queen v. Ball, S. C. & P. 745; Queen v. Farr, S. C. & P. 768.

11 Vol. I., sec. 444.

12 Wright v. Beckett, 1 Moo. & R. 414; King v. Oldroyd, R. & R., C. C. R. 88; Dunn v. Aslett, 2 Moo. & R. 122.

13 Holdsworth v. Mayor of Dartsmouth, 2 Moo. & R. 153; Queen v. Ball, S. C. & P. 745; Queen v. Farr, S. C. & P. 768.

14 2 Phil. Ev. (10th ed.) 995.

15 2 Best Ev. (Morgan's ed.), sec. 645.

16 Bank v. Davis, 6 Watts. & S. 285.

17 Lowe v. Jolliffe, 1 Black. 365; Alexander v. Gibson, 2 Camp. 555.

18 State v. Norris, 1 Hayw. 429.

19 Brown v. Bellows, 4 Pick. 179.

20 Rice v. Insurance Co., 4 Pick. 439.

21 Cowdon v. Reynolds, 12 Serg. & R. 283.

22 Sawrey v. Murrell, 2 Hayw. 397.

23 Chamberlain v. Sands, 27 Me. 19; Commonwealth v. Starkweather, 10 Cush. 59; Adams v. Wheeler, 97 Mass. 67; People v. Safford, 5 Denio, 112; Coulter v. Express Co., 56 N. Y. 588; Thomson v. Blanchard, 4 Comst. 311; Stearn v. Bank, 53 Pa. 490; Quinn v. State, 14 Ind. 589; People v. Jacobs, 49 Cal. 384; Griffin v. Wall, 32 Ala. 149; Brown v. Wood, 19 Mo. 475.

24 Dennett v. Dow, 17 Me. 19; Craig v. Grant, 6 Mich. 447; Bank v. Davis, 6 Watts. & S. 285; Cowdon v. Reynolds, 12 Serg. & R. 283; 2 Whart. Ev. (2d ed.) 730.

25 2 Whart. Ev. 550.

inconsistent statement is given by statute.[26]

The reasons stated in the cases allowing the proof to be made, are, that a party is not to be sacrificed by his own witness; that he is not represented by him nor identified with him; that he ought not to be entrapped by the arts of a designing man, perhaps in the interests of his adversary; that the evidence is to neutralize the testimony of the witness. And in the cases denying the right, it is said that there is danger of such proof being regarded as substantive evidence, it would be permitting one to discredit his own witness, and would be inviting collusion between a party and his witness, enabling the former to get in the naked declarations of the latter as independent evidence.

May the witness be *interrogated* as to his previous contradictory statements?

The English Rule.—There is a dearth of decisions upon this question in England. In the trial of Warren Hastings, a witness professing forgetfulness was asked by the managers for the Commons whether the had no answered a particular question in a particular way before a committee of the House of Commons. The question being objected to, the opinion of the judges was required by the Lords, whose unanimous conclusion was, "that where a witness, produced and examined in a criminal proceeding by a prosecutor, disclaims all knowledge of any matter so interrogated, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer supposed to have been made by such witness in another place, and demanding of him whether the particulars so suggested, were not answers he had so made."[27] It was said this decision went too far, and there was express authority for permitting such a question to be proposed to the witness, and his answer to be taken as conclusive.[28] In Wright v. Beckett,[29] the plaintiff was allowed to question one witness, as to prior inconsistent statements made by the latter, and in Holdsworth v. Mayor of Dartmouth,[30] it was held to be proper for the defendant to inquire of his witness, whether he had not stated a fact differently before the trial, Parke, B., observing that a negative answer from the witness would be conclusive. In Melhnish v. Collier,[31] the question constituted the sole issue and was exhaustively considered, the judges agreeing that if a witness testify contrarily to what the party producing him had a right to expect, causing surprise, he might be questioned as to what he had stated in regard to the matter in issue on former occasions, either in or out of court, for the purpose of refreshing the memory of the witness, giving him full opportunity of explaining his inconsistency, and at all events allowing the party calling him, to set himself right before the jury. And such is the English doctrine now, which prevails also in courts of admiralty.[32]

The Rule in the United States.—The right of a party to question his witness as to his his prior contradictory statements, has been denied by but two cases in this country. In Commonwealth v. Welsh,[33] and Sanchey v. People,[34] criminal cases, the right was denied the plaintiff, in the former, and the defendant, in the latter case, but the opinion of the court in each case was based upon the fact that the inquiry made by the party of his own witness, related to a collateral and impertinent matter and the object was to impeach the witness. These cases can not be considered as holding adversely to the question and were undoubtedly decided correctly. In them the element of surprise was lacking and the sole object of the inquiries was to impeach the witness. In each this questioning went to collateral and impertinent matter, and it is well settled that even the witness of an adverse party, can not be discredited by being interrogated upon other than what is material to the issue.[35]

The leading case upon the question is Bullard v. Pearsall,[36] in which the right to inter-

[26] White v. State, 10 Tex. App. 381; Ryerson v. Abington, 102 Mass. 530.
[27] 2 Phil. Ev. 986, (10th ed.)
[28] Id.
[29] 1 Mood. & R. 414.
[30] 2 Mood. & R. 153.
[31] 15 Ad. & El. (A. S.) 378.
[32] The Lochiblo, 14 Jur. 792.
[33] 4 Gray, 535.
[34] 22 N. Y. 153.
[35] 1 Whart, Ev. (2d ed.) 551.
[36] 53 N. Y. 230; Rapallo, J.: "The further question has frequently arisen, whether the party calling the witness, should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of opinion, that such questions may be asked of the witness, for the purpose of probing his recollection, re-

rogate the witness as to his his previous inconsistent statement is allowed. That case convincingly sets forth all the reasons why the privilege should be granted, and certainly places the matter as it should be. By the adoption of such doctrine, the determination of the question, what is the right of a party when his witness testifies directly opposite to his prior statements, results in choosing the golden mean. The principle is ably defended in numerous cases,[37] and is now the rule recognized as prevailing.

As to how the party producing the witness is to make a proper showing that the testimony surprises him, and is contrary to what he had a right to expect, all the decisions and text books are silent; and it would seem that the bare statement of the party's attorney is sufficient.

W. A. ALDERSON.

Kansas City, Mo.

calling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of explanation may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions, calculated to impair his credibility that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are correct would have the same effect, yet the admissibility of such proof can not be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness which is inadmisible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses, but where the questions as to such statements are confined to the witness himself, we think they are admissable. As a matter of course, such previous unsworn statements are not evidence, and when the trial is before a jury, that instruction should be given.''

37 People v. Jacobs, 49 Cal. 385; Craig v. Grant, 6 Mich. 447; State v. Benner, 64 Me. 267; Campbell v. State, 23 Ala. 44; Hemingway v. Garth, 51 Ala. 530; Bank v. Davis, 6 Watts. & Serg. 285; White v. State, 10 Tex. App. 381; 1 Greenlf. Ev. (Redfield's ed.) sec. 444a; 2 Whart. Ev. (2d. ed.) 549, 550.

CONSTITUTIONAL LAW—SUITS BETWEEN STATES—COLLECTION OF REPUDIATED BONDS.

STATE OF NEW HAMPSHIRE v. STATE OF LOUISIANA; STATE OF NEW YORK v. SAME.

United States Supreme Court, March 5, 1883.

One State can not create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other States to its citizens; and this court is prohibited, both by the letter and spirit of the Constitution of the United States, from entertaining such suits.

Bills in chancery.

W. H. Peckham, for New Hampshire; *W. A. Duer*, *L. W. Russell* and *David Dudley Field*, for New York; *John A. Campbell*, for Louisiana.

Mr. Chief Justice WAITE delivered the opinion of the court:

On the 18th day of July, 1879, the general court of New Hampshire passed an act, of which the following is a copy:

"An act to protect the rights of citizens of this State, holding claims against other States.

"Be it enacted by the Senate and House of Representatives in general court convened:

"Section 1. Whenever any citizen of the State shall be the owner of any claim against any of the United States of America, arising upon a written obligation to pay money issued by such State, which obligation shall be past due and unpaid, such citizen holding such claim may assign the same to the State of New Hampshire, and deposit the assignment thereof, duly executed and acknowledged in the form and manner provided for the execution and acknowledgment of deeds of real estate by the laws of this State, together with all the evidence necessary to substantiate such claim, with the attorney-general of the State.

"Sec. 2. Upon each deposit being made, it shall be the duty of the attorney-general to examine such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the attorney-general, shall, upon the assignor of such claim depositing with him such sum as he, the said attorney-general, shall deem necessary to cover the expenses and disbursements incident to, or which may become incident to, the collection of said claim, bring such suits, actions or proceedings in the name of the State of New Hampshire in the Supreme Court of the United States, as he, the said attorney-general, shall deem necessary for the recovery of the money due upon such claim; and it shall be the duty of the said attorney-general to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment, for the collection of said claim, and to carry such judgment into effect, or, with the consent of the as-

signor, to compromise, adjust and settle such claim before or after judgment.

"Sec. 3. Nothing in this act shall authorize the expenditure of any money belonging to this State, but the expenses of said proceedings shall be paid by the assignor of such claim; and the assignor of such claim may associate with the attorney-general in the prosecution thereof, in the name of the State of New Hampshire, such other counsel as the said assignor may deem necessary, but the State shall not be liable for the fees of such counsel or any part thereof.

"Sec. 4. The attorney-general shall keep all moneys collected upon such claim, or by reason of any compromise of any such claim, separate and apart from any other moneys of this State which may be in his hands, and shall deposit the same to his own credit, as special trustee under this act, in such bank or banks as as he may select; and the said attorney-general shall pay to the assignor of such claims all such sums of money as may be recovered by him in compromise or settlement of such claims, deducting therefrom all expenses incurred by said attorney not before that time paid by the assignor.

"Sec. 5. This act shall take effect on its passage."

Under this act six of the consolidated bonds of the State of Louisiana, particularly described in the cases of State v. Jumel and Elliott v. Wiltz, just decided, were assigned to the State of New Hampshire by one of its citizens. This assignment was made for the purposes contemplated in the act, and passed to the State no other or different title than it would acquire in that way. After the assignment was perfected, a bill in equity was filed in this court in the name of the State of New Hampshire, as complainant, against the State of Louisiana and the several officers of that State who compose the board of liquidation provided for in the act authorizing the issue of the bonds. The averments in the bill are substantially the same as those in Elliott v. Jumel, *supra*, save only that in this case the ownership of the bonds specially involved is stated to be in New Hampshire, while in that it was in Elliott and his associates. The prayer is, in substance, for a decree that the bonds and the act and constitutional amendment of 1874 constitute a valid contract between Louisiana and the holders of its bonds; that the defendants and each of them may be prohibited from diverting the proceeds of the taxes levied under the act from the payment of the interest; and that the provisions of the debt ordinance of 1879 may be adjudged void and of no effect, because they impair the obligation of the contract. The bill was signed in the name of New Hampshire by the attorney-general of that State, and also by the same counsel who appeared for Elliott, Gwynn & Walker in their suit in equity just decided.

On the 15th of May, 1880, the legislature of New York passed the following act:

"An act to protect the rights of citizens of this State owning and holding claims against other States.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. Any citizen of this State, being the owner and holder of any valid claim against any of the United States of America, arising upon a written obligation to pay money, made, executed and delivered by such State, which obligation shall be past due and unpaid, may assign the same to the State of New York, and deliver the assignment thereof to the attorney-general of the State. Such assignment shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such assignment before the delivery thereof. Every such assignment shall contain a guaranty, on the part of the assignor, to be approved by the attorney-general, of the expenses of the collection of such claim, and it shall be the duty of the attorney-general, on receiving such assignment, to require, on behalf of such assignor, such security for said guaranty as he shall deem adequate.

"Sec. 2. Upon the execution and delivery of such assignment, in the manner provided for in section 1 of this act, and furnishing the security as in said section provided, and the delivery of such claim to him, the attorney-general shall bring and prosecute such action or proceeding, in the name of the State of New York, as shall be necessary for the recovery of the money due on such claim, and the said attorney-general shall prosecute such action or proceeding to final judgment, and shall take such proceedings after judgment as may be necessary to effectuate the same.

"Sec. 3. The attorney-general shall forthwith deliver to the treasurer of the State, for the use of such assignor, all moneys collected upon such claim, first deducting therefrom all expenses incurred by him in the collection thereof, and said assignor, or his legal representatives, shall be paid said money by said treasurer upon producing the check or draft therefor of the attorney-general to his or their order, and proof of his or their identity.

"Sec. 4. This act shall take effect immediately."

On the 20th of April, 1881, E. K. Goodnow and Benjamin Graham, being the holders and owners of thirty coupons cut from ten of the consolidated bonds of Louisiana falling due January 1, 1880, July 1, 1880, and January 1, 1881, assigned them to the State of New York by an instrument in writing, of which the following is a copy:

"Know all men by these presents, that we, the undersigned, citizens of the State of New York, being the owners and holders of valid claims against the State of Louisiana, arising upon written obligations to pay money, made, executed and delivered by the State of Louisiana, and now past due and unpaid, being the coupons hereto

annexed, in consideration of one dollar to each of us paid by the State of New York, and for other good and valuable considerations, hereby assign and transfer the said claims and coupons to the State of New York.

"And we do hereby covenant with the said State that if an attempt is made by it to collect the said claim from the State of Louisiana we will pay all the expenses of the collection of the same.

"In witness whereof we have hereunto set our hands and affixed our seals this 20th day of April, in the year of our Lord 1881.

"E. K. GOODNOW, [L. S.]
"BENJ. GRAHAM, [L. S.]

"Sealed and delivered in the presence of
"FRANK M. CARSON."

Thereupon the State of New York, on the 25th of April, filed in this court a bill in equity against the State of Louisiana and the officers of the State composing the board of liquidation, with substantially the same averments and the same prayer as in that of the State of New Hampshire. There was, however, a statement in this bill, not in the other, to the effect that many of the consolidated bonds were issued to citizens of the State of New York, in exchange for old bonds of Louisiana which they held, and that citizens of New York now hold and own bonds of the same class to a large amount. Testimony has been taken in support of this averment.

The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.

Article 3, sec. 2, of the Constitution, provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and citizens of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the judiciary act of 1789, ch. 20, sec. 13 (1 St. 80), the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the conditions of the law, Alexander Chisholm, as executor of Robert Farquar, commenced an action of *assumpsit* in this court against the State of Georgia, and process was served on the governor and attorney-general. Chisholm v. Georgia, 2 Dall. 419. On the 11th of August, 1792, after the process was thus served, Mr. Randolph, the attorney-general of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph thereupon proceeded alone, and in opening his argument said: "I did not want the remonstrance of Georgia to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the acts of another State, whose will must always be dear to me, that she, too, condemned it."

On the 19th of February, 1793, the judgment of the court was announced and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it. All the justices who heard the case filed opinions, some of which were very elaborate, and it is evident the subject received the most careful consideration. Mr. Justice Wilson, in his opinion, used this language: (p. 465.) "Another declared object (of the Constitution) is, 'to establish justice.' This points in a particular manner to the judicial authority. And when we view this object in conjunction with the declaration 'that no State shall pass a law impairing the obligation of contracts,' we shall probably think that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts, and be amenable, for such violation of right, to no controlling judiciary power?"

And Chief Justice Jay (p. 479): "The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice without respect to persons, and by securing individual citizens as well as States in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is useful, because it is honest: because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free Republican national government, which places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action and enforces the great and glorious principle that the people are the sovereign of this country, and consequently that fellow-citizens and joint sovereigns can not be degraded by appearing with each other in their own courts to have their controversies determined."

Prior to this decision the public discussions had been confined to the power of the court under the Constitution to entertain a suit in favor of a citi-

zen against a State, many of the leading members of the convention arguing, with great force, against it. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the governor. This led to the convening of the general court of that commonwealth, which passed resolutions instructing the senators and requesting the members of the House of Representatives from the State "to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or articles of the said constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other States also took active measures in the same direction, and soon after the next Congress came together, the eleventh amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1798. That amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or in equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State."

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted solely by the owners of the bonds and coupons. In New Hampshire, before the attorney-general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney-general such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the attorney-general, as special trustee, separate and apart from other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses incurred, not before that time paid by the owner. The bill, although signed by the attorney-general, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the attorney-general are only nominal actors in the proceeding. The bond-owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and, if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses, and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition of the amendment, the States may prosecute the suits, because, as the "sovereign and trustee of its citizens," a State is "clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in United States v. Diekelman, 92 U. S. 524, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war."

All the rights of the States, as independent nations, were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political *status* at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State." Article 1, sec. 10, cl. 3.

But it is said that even if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force, it got in lieu the constitutional right of suit

in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International Law, vol. 2 (2d ed.), p. 12: "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State." Whether this be in all respects true or not, it is clear that no nation ought to interfere, except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we can not believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to be the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citzen himself, was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy, there was no other left. Nothing was added to the Constitution by what was thus done. No power, taken away by the grant of the special remedy, was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm Case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued; and, in our opinion, one State can not create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each of them is consequently dismissed.

CONTRACT—AGENT TO MAKE WAGERS—AUTHORITY TO PAY.

READ v. ANDERSON.

English High Court, Queen's Bench Division, November 16, 1882.

If a person employs another to make bets in that other's name, an implied authority to pay if the bets are lost is coupled with the employment; and the moment the bet is made the authority to pay it, if lost, becomes irrevocable.

July 3.—*McCall* (*W. G. Harrison*, Q. C., with him), for the plaintiff; *Petheram*, Q. C., and *Metcalfe Dale*, for the defendant.

Cur. adv. vult.

Nov. 16. — HAWKINS, J. — This action was brought to recover £175, the amount of three bets made by the plaintiff in his own name at the request of, and for, the defendant, and paid by the plaintiff to the winners thereof. It was tried before me without a jury.

The plaintiff is a turf commission agent, and a member of Tattersall's Subscription Room. The defendant is a licensed victualler at South Shields.

According to well-established usage, known to the defendant, a turf commission agent instructed by an employer to back a horse, backs it in his own name, and becomes himself alone responsible to the layer of the odds, or the person with whom the bet is made; and, on the settling day after the event, he receives or pays, as the case may be, rendering his own account to his employer, paying to, or receiving from him the balance of moneys won or lost.

For some time before the Ascot meeting, 1881, the plaintiff had, according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to, or receiv- from, him the balance thereof.

On the Friday of the Ascot meeting (June 17, 1881) the plaintiff, being at Ascot received from the defendant a telegram to this effect:—"Put me fifty on Limestone, first race; pony all Archer's mounts; fifty Sword Dance, hundred Elf King, Wokingham; hundred, Red Flag filly, Castle Stakes. Reply."

This telegram, though handed in at South Shields at 12.8 p. m., and received at Ascot at 1.29 p. m.. did not reach the plaintiff until 1.40 p. m., at which time the first race for the day, in which Limestone ran, was over, that race having been run at 1.30 p. m.; for that race, therefore, Limestone could not be backed.

The second race of the day was the Wokingham Stakes, which was set for two o'clock. For that race Sword Dance and Elf King, mentioned in the telegram, and Valentine, ridden by F. Archer, were entered; the plaintiff accordingly, acting on the telegram, backed, in his own name, Elf King for £100, Sword Dance for £50, and Val-

entino (as one of Archer's mounts) for £25. Neither of these horses won; the consequence was that these bets, to the amount of £175, the subject of the present action, were lost.

At 2.15 p. m. the plaintiff handed in at the telegraph office at Ascot the following message to the defendant:—"Nothing done Limestone or Archer's mount the first race—your message came ten minutes after the race." In this message, which was not delivered to defendant until 3.14 p. m., it will be observed nothing is said about the second race; but at 3.5 p. m. the plaintiff telegraphed the result of that race to the defendant, in these terms:—"Your message received; Viridis won." This was evidently a mistake, for no such animal as Virdis ran in the race. The Wokingham was won by Wokingham, by St. Albans, out of Viridis. The mistake, however, is immaterial. This message was not received at South Shields until 3.35 p. m., and then defendant had received information by telegram from another person of the result of the first two races.

On the evening of the same day the defendant repudiated these bets, and all liability in respect of them, by the following letter to the plaintiff:—

"Exchange Vaults, South Shields, June 17, 1881.

"Mr. Read, — I find your message was not handed in before the race for the Wokingham Stakes; I had the result of the race ten minutes before I received your reply. I enclose you the message, which please return to me; they were both handed in at 2.15, that being fifteen minutes after the order of running; so I shall consider I am not on anything for two first races to-day, as I can not stand the message being sent away after the race is over to say I am on.—In haste, I remain yours respectfully, J. ANDERSON."

In reply to this letter the plaintiff wrote to defendant as follows:—

"Dear Sir,—The reason you did not get your message about Elf King, S. Dance, and F. Archer's mounts sooner, was on account of so many messages being sent about the results of the Wokingham Handicap.

"The following bets I took for you. I enclose you the names:—100—800 Elf King.—Jacob, A.; 50—225 S. Dance.—Robinson, J.; 25—150 Valentine.—Masterman."

With this letter the plaintiff sent a detailed account of the various bets he had made for the defendant during the Ascot meeting, and of the amounts which he would have to receive from, and pay to, the defendant. In number there were between fifty and sixty, and the account showed that upon these the defendant's losses, including the bets in question, amounted to £1,420 0s. 5d., whilst his winnings were £705 17s. 4d., leaving a balance of £714 3s. 1d. to be paid by the defendant.

The defendant in reply, on the 19th of June, enclosed a cheque for £539 3s. 1d., as being the real balance due, and with regard to the difference, £175, wrote thus:—"I can not think about paying the other, as I have other people to please as well as myself, and paid for reply, and you say you received message ten minutes too late for first race, but you can not give any excuse for not answering it until the next race was over. I am quite satisfied that had any of them won I should not have been on."

Other correspondence followed, but is not material for the question I have to decide.

On the settling day the plaintiff paid the three bets in question to the winners of them; had he not done so he would have been a "defaulter" within the meaning of the 3rd rule of Tattersall's New Subscription Room; and if, upon complaint made to the committee of the room, the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it; and by the 50th of the Rules of Racing made by the Jockey Club, if he had been reported by such committee as being a defaulter in bets, he would, until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the Rules of Racing as to entering and running horses; the consequences of becoming a defaulter would, therefore, have been very serious to the plaintiff.

For the defendant, it was contended, first, that the authority to make the bets in question was subject to an express condition that the defendant should be informed by the plaintiff by telegram delivered at the telegraph office before the race was run that he was "on"—that is, that the bets had been made on his behalf. Secondly, that if there was no such express condition, there was a universal usage and custom importing a condition to that effect into every authority conveyed by telegram to back horses when a reply was paid; and that, inasmuch as no reply telegram was handed in by the plaintiff for the defendant until a quarter of an hour after the race was run, the defendant was entitled to repudiate the bets as he did by his letter.

The defendant further insisted that the bets were wagering contracts; that he had never given any authority to the plaintiff to pay them; and, even if he had, that authority was revoked before the money was actually paid.

I am of opinion, and I find as a fact, that there was no such express condition, nor is there any such usage or custom as contended for. The payment for a reply to the telegram requesting the plaintiff to back the horse no doubt was an intimation to the plaintiff that the defendant desired to be speedily informed of what had been done, or was about to be done, on his behalf; but it did not constitute a condition to the plaintiff's authority to make the bets. As a matter of fact, where it can be done, a message in reply is, no doubt, usually handed in at the office before the race; but no universal custom or usage was established before me, making it imperative upon the commission agent to do this as a condition to his binding his customer. Long and unreasonable delay

in replying until after the race is run and the event known might, under certain circumstances, afford strong ground for suspecting that, in fact, the agent did not make the bets on behalf of his customer, and was fraudulently attempting to saddle him with the loss; there is, however, no evidence before me to justify such an imputation in the present case. It was clearly established to my satisfaction that the bets were made *bona fide* by the plaintiff for the defendant in pursuance of the telegram, and that plaintiff paid those bets in discharge of his liability to the persons with whom they were made. The objections of fact, therefore, fail.

This brings me to the consideration of the legal objections to the plaintiff's claim. I am of opinion that neither of them can be sustained. At common law, wagers were not illegal, and, before the passing of 8 & 9 Vict. c. 109, actions were constantly brought and maintained to recover money won upon them. The object of 8 & 9 Vict. c. 109 (passed in 1845) was not to render illegal wagers which, up to that time, had been lawful, but simply to make the law no longer available for their enforcement, leaving the parties to them to pay them or not as their sense of honor might dictate. Accordingly it was, by the 18th section enacted, in these words: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager." There is nothing in this language to affect the legality of wagering contracts; they are simply rendered null and void, and not enforceable by any process of law. A host of authorities have settled this to be the true effect of the statute. I will mention only one or two. In Fitch v. Jones, 3 W. R. 507, 5 E. & B. 238, it was expressly so decided, Mr. Justice Erle saying, "I think that the defendant might, without violating any law, make a wager. If he lost, he might, without violating any law, pay what he had lost." In Hill v. Fox, 4 H. & N. 359, the same learned judge said that the parties do not violate any law by making a bet; but the law will not assist the winner in enforcing payment of it. In *Ex parte* Pyke, *In re* Lister, 26 W. R. 806, L. R. 8 Ch. D. 754, I observe the Master of the Rolls, at p. 757, is reported to have spoken of gaming or betting being illegal. I feel sure that learned judge must have been misunderstood; see his judgment in Lynch v. Godwin, 26 Solictors' Journal, p. 509, in which he expressly stated that a bet was void but not illegal.

But although the law will not compel the loser of a bet to pay it, he may lawfully do so if he pleases; and what he may lawfully do himself he may lawfully authorize anybody else to do for him; and if, by his request or authority, another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use.

In Rosewarne v. Billing, 12 W. R. 104, the defendant had employed the plaintiff to make, in his own name, wagering contracts respecting mining shares, and the plaintiff accordingly made them, and paid certain differences on such shares, and brought this action to recover from defendant (his employer) the money so paid. In giving judgment for the plaintiff, Chief Justice Erle said: "It is clear that, though the defendant was not liable to pay the sum due under these wagering contracts, he might do so if he chose. And if a party loses a wager, and requests another to pay it for him, he is liable to the party so paying it for money paid at his request." Oldham v. Ramsden, 44 L. J. C. P. 309; 23 W. R. Dig. 32, is to the same effect. So is *Ex parte* Pyke, *In re* Lister, in which an appeal by the trustee under Lister's bankruptcy against the registrar, for allowing a proof by Barrett for money lent and paid by him, at Lister's express request, in discharge of lost bets at Tattersall's, was dismissed by the Court of Appeal.

The request or authority to make such payment may be either express, or it may be implied from usage or from the nature of the dealings between the parties themselves. If a person authorizes another to bet for him in his own name, an implied request to pay if the bets are lost, is involved in that authority. For this, too, there is abundance of legal sanction. In Bubb v. Yelverton, 19 W. R. 739, which was a suit for the administration of the estate of the Marquis of Hastings, deceased, Lord Charles Ker claimed a sum of £850 for money paid for the marquis for bets made and lost on his account, it was held by Lord Romilly, M. R., that a request to bet implied an authority to pay the bets if lost, and that Lord Charles Ker was entitled to prove against the estate of the marquis for the amount paid. See, also, Oldham v. Ramsden, and Rosewarne v. Billing, and lastly, Lynch v. Godwin. I am not aware that this case has been reported in any of the regular reports at present.

In the present case I find as a fact, that, at the time the defendant gave the authority to make the bets, he gave also an implied authority to pay them if they should be lost.

The defendant, however, contended that, assuming wagering contracts not to be illegal, and that a person who employs another to bet, gives that other implied authority to pay, such authority may be revoked at any time before payment is actually made, and that it was revoked in the present case. Upon the evidence before me, I am of opinion, and find as a fact, that the defendant did not revoke the authority to pay; on the contrary, by settling the rest of the account, he seems to me to have confirmed that authority to pay whatever bets were honestly made and lost on his account; and the correspondence satisfies me that he only desired to raise the question whether these particular bets were honestly made or not. Assuming, however, contrary to my opinion, that there was a revocation in fact, I am of opinion such revocation was inoperative in law. I am not

aware that hitherto this point has been judicially decided, although it was shortly mooted in Rosewarne v. Billing. I think it right, therefore, to state my reasons for the conclusions to which I have arrived.

As a general rule, a principal is, no doubt, at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is, that when the authority conferred by the principal is coupled with an interest based on good consideration, it is in contemplation of law irrevocable—that is, though it may be revoked in fact—that is to say, by express words, such revocation is of no avail. In Smart v. Sandars, 5 C. B. 895, Chief Justice Wilde said: "The result appears to be, that, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." See also Story on Agency, secs. 476, 477.

In the present case, the authority to pay the bets, if lost, was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost; the consideration for that authority was the taking upon himself the responsibility at the defendant's request. Previous to the making of the bets, the authority to bet might, beyond all doubt, have been revoked; but the instant the bets were made, and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words, the case may be stated thus—if a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time to give him an authority if the obligation is incurred, to discharge it at the principal's expense, the moment the agent on the faith of that authority does the act, and so incurs the liability, the authority ceases to be revocable.

The cases of Hampden v. Walsh, 24 W. R. 607; L. R. 1 Q. B. D. 189; and Diggle v. Higgs, 25 W. R. 777; L. R. 2 Ex. D. 422, were cited for the defendant in support of his contention that the authority to pay was revocable. Those cases do not assist him; they were actions brought against stakeholders to recover back deposits or wagers, and the revocation of the authority to pay over to the winner was before the money was paid over; in each of those cases the stakeholders must be taken to have received the deposits subject to the legal obligation to return them to the depositors if demanded back before payment over. The stakeholder's authority in those cases was coupled with no interest, and his position was unaffected by the revocation. Those cases are, therefore, not like the present, and do not fall within the exception to the rule I have referred to.

The opinion I have expressed as to the irrevocability of the authority to pay lost bets, applies only to cases where the agent by the principal's authority makes the bets in his own name, so as to be personally responsible for them. If an agent were simply to make bets in the name of his principal, I am far from saying that the principal might not repudiate authority to pay at any time before payment was actually made; for his non-payment of bets made for him and in his name would not render his agent liable as a defaulter, or subject such agent to loss or obloquy. It is not necessary, however, to decide this point now.

The plaintiff's case may also, as it seems to me, be supported on this ground, that if one man employs another to do a legal act which, in the ordinary course of things, will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to indemnify his agent, is implied by law (see Story on Agency, secs. 337-340); and I think it signifies nothing that such obligation is not enforceable in a court of justice, if the non-fulfilment of it would entail serious inconvenience or loss upon the agent, for he is not bound to submit to these things for his employer if, by doing that which was in contemplation of both at the time of the employment, he can avoid them, as he can in the case of bets lost, by paying them: and he is not bound, in my opinion, to incur the odium and consequences of repudiating his honorable engagements. As a matter of fact, I find that when the plaintiff in this case was employed to bet, there was a tacit agreement on the part of the defendant to indemnify him against all the ordinary consequences of so doing.

In pleading, such a contract in indemnity might in substance be thus described—in consideration that the plaintiff, as a turf commission agent, would, at the request of the defendant, and as his agent, make for him in his, the plaintiff's, own name, certain bets, subject to and according to the usages of Tattersall's, the defendant promised that he would indemnify the plaintiff against all the consequences of making such bets according to such usages, etc. Many cases might be cited to show that such a contract, though made with reference to, and in contemplation of, wagering contracts, is not, in itself, a wagering contract. See Bubb v. Yelverton, 18 W. R. 512, L. R. 9 Eq. 471; Johnson v. Lansley, 12 C. B. 468; Beeston v. Beeston, 24 W. R. 96, L. R. 1 Ex. D. 13.

The result is, that if a person employs another to bet for him in the agent's own name, an authority to pay the bets, if lost, is coupled with the employment; and, although before the bet is made, the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bet, the authority to pay it, if lost, becomes irrevocable.

For the reason I have stated, I am of opinion that the plaintiff is entitled to my judgment for the amount he claims, and I give judgment accordingly. On full consideration I have determined to allow such amendment (if any) in the pleadings as may be necessary to raise all the legal questions involved in the case, in order that it

may be determined upon its true legal merits. The costs will follow the event of the action.

Judgment for the plaintiff.

CORRESPONDENCE.

CRITICISM OF JUDICIAL ACTS BY LEGAL JOURNALS.

To the Editor of the Central Law Journal:

DEAR SIR:—I have been much interested in the controversy between several law journals, with respect to criticisms upon the reported decisions of our courts, and subscribe heartily to the conclusion reached in your last issue (April 13), that such criticism is not only proper, but is of good value to both bench and bar. It may be worth while to learn from the experience of other nations on a point like this. Most of your legal readers, no doubt, are aware that the European States, and especially the German Empire, have made a great advance of late years in the use of reported cases, and that in this respect, as well as others, there is a constant assimilation between their jurisprudence and our own. The reports of the highest Imperial court, in the eight years following its institution, 1871-1879, fill twenty-three volumes, and about two volumes are added every year. The numerous other series of German Reports as well as those of France, Italy, etc., are too well known to need mention here. My purpose is only to point out that a systematic and severe criticism of these decisions is regarded by the bar of these countries, and even by the judges whose productions are criticised, as almost indispensable to the proper development of law in this form. So far from looking upon such criticism as disrespectful or unfriendly, they welcome it, and even judges of the higher courts take an avowed part in its publication for general use. In a late number of the well-known *Kritische Vierteljahrsschrift fur Gesetzgebung und Rechtswisenschaft* (XXIV., 491), may be found an interesting notice of a critical review devoted to the sole purpose of reviewing the decisions of the Imperial Court, and conducted by the senior judge of the Landgerecht in Posen, E. Rocholl. A brief extract from this notice may not be without interest in this connection, though I am compelled to omit in translation much that bears directly on the question in hand:

"The Imperial Court itself can only be glad of such attention to its opinions. It stands far above any childish belief of its own infallibility, and knows very well by experience how hard it is to avoid mistakes without the help of desinterested observers. But it is not in protection from positive mistakes that such criticism proves of the greatest benefit; that benefit consists rather in the common contributions of both parties, court and critics, to the development of new law. For years to come the Imperial Court must be the most fruitful source of such law, for all Germany, especially in the field of private law. Law so produced is, of course, quite different fom that which is the result of legislation. It is elastic and susceptible of modification until time has consolidated it into the form of customary law. In Rome the proctor consulted with the *jurisperiti*, the counsel learned in the law, before he framed the edicts in which the *æquitas* took its place beside the strict law. He could easily do this because they were few in number and well known. No such consultation is possible at present, though the need of such mutual action of bench and bar is as great as it was in Rome, or even greater. We must find a substitute for it in some arrangmen adapted to modern life. We need a central organ for the opinion of the bar, for the criticism of judicial opinions generally. There is no lack with us of legal periodicals even now, but none of them can spare the space necessary for this office. A volume every year, and not a thin one, would be a moderate allowance of space. It would require careful editing, and especially the enforcement of brevity upon contributors. It must avoid even the suspicion of ill-will toward the tribunal whose decision was criticised. There should not be even the appearance of opposition; the critic and judge should both feel that they are co-workers, laboring together to accomplish a great purpose for which neither, alone, could be sufficient."

Every legal reader will be able to apply these remarks to our American circumstances without aid. Yours respectfully, W. G. H.

St. Louis, April 16th, 1883.

RECENT LEGAL LITERATURE.

COOLEY'S CONSTITUTIONAL LIMITATIONS. A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union. By Thomas M. Cooley, LL.D. Fifth Edition, with Considerable Additions, giving the Results of the Recent Cases. Boston. 1883: Little, Brown & Co.

This really great work on the system of organic law in this country is so well known and appreciated by the profession that nothing that we could say would be likely to add to the estimation in which it is held. Its assistance is universally recognized at this day as indispensable to a proper understanding of the intricate and difficult questions which arise upon constitutional points. The present edition embodies the citations of many most important and interesting cases which have been decided during the five years which have elapsed since the fourth edition was issued in April, 1878. The paper, press work and typography are very handsome, according well with the substantial character of such a standard work.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—PRIZE—CAPTURE WITHOUT PROBABLE CAUSE—MEASURE OF DAMAGES.

When it has been decided on a former appeal that the capture of a vessel by the army and navy of the United States was without probable cause, and that the owner was entitled to a reasonable indemnity for the losses sustained, the measure of such indemnity would be reasonable demurrage for such time as it was detained by the United States, estimated at the rate per day fixed in the charter party entered into by the government authorities with the captain of the vessel, including reasonable compensation for the pay and expenses of an agent to look after the interests of owners up to the time of the delivery of the vessel to the navy department by the court. It is the duty of a captor to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages, and under the law of nations this rule applies to the United States as captors. When the United States, through the executive of the nation, waive their right to exemption from suit and ask the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, the government is bound by the submission, and it is the duty of the court to proceed to the final determination of all questions legitimately involved. *United States v. Nuestra Senora De Regla*, U. S. S. C., March 12, 1883; 2 S. C. Rep. 287.

COMMON CARRIER—LOSS OF GOODS—TITLE OF SHIPPER—MEASURE OF DAMAGES.

A husband has a sufficient interest in the wearing apparel belonging to his wife, to constitute him a real party in interest, under the Code, in an action for the recovery of damages occasioned by their loss by a carrier. A carrier is not at liberty to dispute the title of the person from whom he receives the goods for shipment, when sued for the loss of the same, having dealt with such shipper as the owner or rightful custodian of the goods shipped. The measure of damages for the loss of household furniture and wearing apparel, when kept for personal use and not for sale, is to be fixed by considerations of cost and actual worth at the time of the loss, and not by their market value at the place of destination; unless it may be shown that the particular goods have a market value, and can be replaced at such point. *Denver, etc. R. Co. v. Frame*, S. C. Colorado, 1 Denv. L. J., 66.

3. EASEMENT—USE OF RIGHT-OF-WAY.

A right-of-way appurtenant to a tract of land, whose use is not in way or manner qualified or restricted, may be used by not only the party in whom such right is vested, but also by all to whom he may grant permission for its use. Those who are entitled to the use of the dominant tenement can not be regarded as trespassers. *Gunson v. Healy*, S. C. Pa., Oct. 2, 1882; 13 Pittsb. L. J., 342.

4. EQUITY—JURISDICTION—SUIT BY BONDHOLDERS ON MORTGAGED CHOSE IN ACTION—REMEDY AT LAW.

Certain bondholders, whose bonds with others were secured by a common mortgage given by a corporation, filed a bill to recover certain moneys alleged to be due on a contract made by the city of Memphis with the mortgagor, which contract was assigned in the mortgage as part of the security for the bonds. *Held*, that as the demand against the city was cognizable at law in the name of the mortgagor, and no special circumstances being shown for a resort to equity, the bill should be dismissed. *New York Guaranty and Indemnity Co. v. Memphis Water Co.*, U. S. S. C., March 12, 1883; 2 S. C. Rep., 279.

5. RAILROAD COMPANIES — CONTRACTS BETWEEN CONNECTING ROUTES — CONNECTIONS WITH STEAMBOAT LINES.

A railroad corporation, whose railroad extends across the State of Wisconsin from Lake Michigan to the Mississippi river, and which is authorized by its charter to make "such contracts with any other person or corporation whatsoever, as the management of its railroad, and the convenience and interest of the corporation, and the conduct of its affairs, may, in the judgment of its directors, require;" and, by general laws, to make such contracts with any railroad company, whose road terminates on the eastern shore of Lake Michigan, any such contract "as will enable them to run their roads in connection with each other in such a manner as they shall deem most beneficial to their interest;" and "to build, construct, and run, as part of its corporate property, such number of steam-boats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "accept from any other State or Territory of the United States, and use, any powers or privileges applicable to the carrying of persons and property, by railway or steamboat, in said State or Territory,"—has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to ento into an agreement with the proprietors of steamboats running by way of the great lakes, between its eastern terminus and Buffalo, in the State of New York, by which it guaranties that the gross earnings of each boat for two years shall amount to a certain sum. *Green Bay, etc. R. Co. v. Union Steamboat Co.*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 221.

6. RAILROAD MORTGAGE — FORECLOSURE — ASSIGNED CLAIMS.

The assignee of the original creditors of a corporation may recover their claims against the income of the mortgaged premises, because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent, before any income arises which ought to be applied to the discharge of the mortgage debt. *Union Trust Co. v. Walker*, U. S. S. C., March 12, 1883; 2 S. C. Rep., 299.

7. REVENUE LAWS — CUSTOM DUTIES — COTTON LACES.

By schedule D to the act of July 30, 1846 (9 St. at Large, 46), a duty of 25 per cent. *ad valorem* was imposed on "cotton laces, cotton insertings," and "manufactures composed wholly of cotton, not otherwise provided for." By section 1 of the act of March 3, 1857 (11 St. at Large, 192), the duties on the articles enumerated in Schedules C and D of the act of 1846, were fixed at 24 and 19 per cent., respectively, "with such exceptions as are hereinafter made." By section 2 of the act of 1857,

"all manufactures composed wholly of cotton, which are bleached, printed, painted or dyed, and delaines," were transferred to Schedule C. *Held*, that laces and insertings composed wholly of cotton, and bleached or dyed, were dutiable at 24 per cent., under the act of 1857. The designations qualified by the word "cotton," in the act of 1816, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade, and are designations of quality and material. Under section 2 of the act of March 2, 1799 (1 St. at Large, 706), the following fees are not chargeable at the custom-house: A fee for putting on an invoice a stamp or certificate as to the presentation of the invoice; a fee for an oath to an entry or for a jurat to such oath; a fee for an order from the collector to the storekeeper to deliver examined packages. *Cochran v. Schell*; *Schell v. Cochran*, U. S. S. C., March 19, 1883; 2 S. C. Rep., 301.

8. TAXATION—FOREIGN CORPORATIONS—CONSTITUTIONAL LAW.

Foreign corporations doing business within the State of Pennsylvania, are liable under existing laws to pay a license tax for the protection afforded by the State to such corporations; but they can not be taxed for the whole amount of their capital stock, unless they make this State their domicile and the *situs* of their property. The mere act of a foreign corporation sending its agents to transact business within this Commonwealth, does not render its entire capital stock liable to taxation under existing laws. The State has no power to tax foreign corporations for the mere holding of stock in corporations or limited partnerships in this Commonwealth, which have already paid the tax levied upon them. Distinction, for the purpose of taxation, between capital stock of a corporation and the certificates of stock held by its members. A foreign corporation does not render itself liable to taxation within this State by the purchase of raw material which is shipped to its place of domicile for manufacture. When an act giving to the Commonwealth the power of collecting taxes, together with penalties for non-payment, etc., is repealed, reserving to the Commonwealth the right to collect all taxes accrued, the penalties can not be recovered upon suits afterwards instituted to collect the taxes. *Commonwealth v. Standard Oil Co.*, S. C. Pa., Nov. 20, 1882; 13 Pittsb. L. J. 339.

9. TAXATION—IMMUNITY OF CEMETERY COMPANY—AMENDMENT OF CHARTER—CONSTITUTIONAL LAW.

A cemetery company was incorporated in 1854 by an act of Congress, which authorized it to purchase and hold ninety acres of land in the District of Columbia, and to receive gifts and bequests for the purpose of ornamenting and improving the cemetery; enacted that its affairs should be conducted by a president and three other managers, to be elected annually by the votes of the proprietors, and to have power to lay out and ornament the grounds, to sell or dispose of burial lots, and to make by-laws for the conduct of its affairs and government of lot-holders and visitors; fixed the amount of capital stock, to be divided among the proprietors according to their respective interests; and provided that the land dedicated to the purposes of a cemetery should not be subject to taxation of any kind, and no highways should be opened through it, and that it should be lawful for Congress thereafter to alter, amend, modify or repeal the act. Afterwards thirty of the ninety acres were laid out as a cemetery, the cemetery was dedicated by public religious services, and a pamphlet was published, containing a copy of the charter, a list of the officers, an account of the proceedings at the dedication, describing the cemetery as "altogether comprising ninety acres, thirty of which are now fully prepared for interments," and the by-laws of the corporation, which declared that all lots should be held in purance of the charter. No stock was ever issued. But the owner of the whole tract, named in the charter as one of the original associates, and in the list published in the pamphlet as the president and a manager of the corporation, knowing all the above facts, and never objecting to the appropriation of the property as appearing thereby, for more than twenty years managed the cemetery, sold about 2,000 burial lots, and gave to each purchaser a copy of the pamphlet, and a deed of the lot, signed by himself as president, bearing the seal of the corporation, and having the by-laws printed thereon. In 1877 Congress passed an act, amending the charter of the corporation, providing that its property and affairs should be managed so as to secure the equitable rights of all persons having any vested interest in the cemetery, by a board of five trustees to be elected annually,—three by the proprietors of lots owned in good faith upon which a burial had been made, and two by the original proprietors,—and that of the gross receipts arising from the future sale of lots, one-fourth should be annually paid by the trustees to the original proprietors, and the rest be devoted to the improvement and maintenance of the cemetery. *Held*, that the act of 1877 was a constitutional exercise of the power of amendment reserved in the act of 1854; that the owner of the land was estopped to deny the existence of the corporation, the setting apart of the whole ninety acres as a cemetery, and the right of the lot-holders to elect a majority of the trustees; and that he was in equity bound to convey the whole tract to the corporation in fee, and to account to the corporation for three-fourths of the sums received by him from sales of lots since the act of 1877, and the corporation to pay him one-fourth of the gross receipts from future sales of lots. Pending a bill in equity against the owner of land to compel a conveyance of the title, subject to certain rights of his in the rents and profits, a receiver appointed in another suit against him, and to whom he had by order of court in that suit assigned his interest in the land, applied to be and was made a defendant, and answered, and also filed a cross-bill against both the original parties, which was afterwards ordered to be stricken from the files, with leave for him to apply for leave to file a cross-bill; but he never applied for such leave. The case was heard upon pleadings and proofs, and a final decree entered ordering the original defendant to convey to the plaintiff, and the plaintiff to account to him or his assigns for part of the rents and profits, and that this decree be without prejudice to the rights of the receiver. *Held*, that the receiver was not aggrieved. *Close v. Glenwood Cemetery; Borcherling v. Glenwood Cemetery*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 167.

10. TRUST—SPENDTHRIFT TRUST—ALIMONY—ATTACHMENT.

The income of a spendthrift trust, the terms of which exclude anticipation, and provide that it

shall not be subject to "execution, attachment, or sequestration for any debts or liabilities whatever," is not liable to an attachment *sru* execution for arrears of alimony. Such a debt, in this particular, does not stand upon a basis different from that of any other debt. *Thackara v. Mintzer*, S. C. Pa., Oct. 2, 1882; 13 W. N. C. 22.

11. UNITED STATES — CLAIM AGAINST GOVERNMENT—LIMITATIONS BY STATUTE.

Where by act of congress the time within which the government may be sued by a party making a claim against it has been limited to six years, the fact that appellant's claim accrued at a time when the government came under a legal obligation to pay the amount thereof, or when, had the transaction occurred with a citizen, it would have accrued against that citizen; that the claimant was at that time, or any time prior thereto, unable, by reason of his connection with the rebellion, to comply with the terms upon which the government had consented to be sued in the court of claims,—can not have the effect of enlarging the time fixed by the statute of limitations. His remedy, if the claim be a valid one, is to apply to the legislative department of the government. The courts can not, in view of the language of the statute, exclude from computation, on the issue of limitation, the time intervening between the accruing of the claims and the promulgation of the amnesty proclamation. *Kendall v. United States*, U. S. S. C., March 5, 1883; 2 S. C. Rep. 277.

QUERIES AND ANSWERS.

[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

36. Husband and wife, in 1865, make a deed purporting to convey in fee a tract of the wife's land in Arkansas, whereof the wife at the time was seized of one moiety only. She afterwards acquires the other moiety. Having become a widow, can she maintain ejectment for the after-acquired moiety? The rule in Van Rensalaer v. Kearney, 11 How. 297, is statute law. X.

Jacksonport, Ark.

37. A owns land through which he builds a sewer eight feet below the surface. He then sells the sewer to X, with right to use, maintain and repair the same. He then sells the land to B, with covenants of warranty and against incumbrances, B having full knowledge of the sewer. B sells to C with like covenants. C sues A on the covenants in the deed from A to B. Can he maintain his action? Why? Why not?

Lowell, Mass. MASS.

38. A brings an action by attachment on a note not due, against B, and has certain real estate attached. Before the bringing of the action, B had sold the real estate attached to C, an innocent purchaser for value. C, however, did not record his deed (which was of the same date as the attachment), till after the levy of the attachment. In the action B traversed the affidavit for attachment, and at the same time filed an answer, denying the right of A to recover. No trial of either issue thus raised was had, and about one year afterwards. A, in open court, confessed judgment (the note sued on having in the meantime become due), and on his confession, a general judgment against B, without any special judgments against the property attached, was rendered. Supposing the attached property to be levied on and sold under an execution issued on such judgment, how will it affect C's title? H. & C.

Denver, Colorado.

39. A and B have fields adjoining. Our statute provides that adjoining land owners shall each erect half of the partition fence. A builds his half of the fence, and notifies B that he (A) intends putting stock into his close, and for B to erect his share of the partition, lest his (A's) stock damage B's field. B neglects to put up his fence as required by statute, whereby A's cattle stray into B's field and do damage thereto. Will an action lie against A under the herd law, for damages which arose wholly through B's laches in not building his partition fence? In other words, can B take advantage of his own negligence, and recover damages from A? C. G. H.

Baxter Springs, Kan.

40. A holds a note against B for $300. B has a judgment for $900 against C, a gravel road corporation of which he is a member. There is an execution and levy upon said corporation, and it is offered for sale, the corporation has a meeting and elect new officers, they decide, in order to save said road, to pay said judgment the next day, and so inform B. A is informed of their decision also. A agrees to surrender his note to B and does, for B to have the amount credited upon his judgment against the corporation, the corporation to pay A. The new board elected find on the next day that the old board made no defense to B's action at all, and refuse to pay said judgment, but take proper steps for enjoining the sale of the road and defend and arbitrates and appeal. B credits his judgment with the face of said note without consulting the corporate board, and says A's note is now paid so far as he is concered. Can A recover of B the amount of his note, or is the amount lost. B, while the case of the corporation is in the Supreme court undecided, gets a controling interest in said road, and at a meeting for electing officers, elects himself, two sons and one son-in-law as directors of said corporation and dismisses the suit on an appeal, and commences to pay his judgment, still refusing to pay A, or to allow the corporation to pay him either. What is A's action and against whom? Give authority if any. WM. W. S. M.

Indianapolis, Ind.

QUERIES ANSWERED.

Query 20. [16 Cent. L. J. 159.] A makes a promissory note payable to B, to secure a debt, and sent the note to B by mail. B sent the note back, saying that he would not accept it unless the rate of interest was increased and the time shortened. A then destroyed the note. B allowed his original claim to outlaw, and having taken a copy of the note, sues upon it, alleging original to have been destroyed. Can he recover? J. P. W.

Youngstown, Ohio.

Answer No. 2. Without resorting to an examina-

tion of the law books for authority, it seems to me the solution of the question on general principles is without difficulty. A promissory note, like deeds and other instruments, takes effect only from the time of delivery. There must be delivery and acceptance. In this case B refused to receive the note and returned it. Sending the note was an offer on the part of A; B's returning the note with a change of terms was a refusal, and no principle is better established than that an offer does not become a contract unless accepted. These principles I think are applicable and conclusive of the question. Z. H.

Chicago, Ill.

Query 26. [16 Cent. L. J. 278.] A and wife owned in Texas in December, 1882, a homestead then occupied by themselves and family. B, then one of the creditors of A, levied an execution on the above homestead while occupied. Three day's after the levy of execution, A and wife sell the homestead to C, and join in a deed by them duly signed and acknowledged to C for the premises, to whom they then delivered possession. B, pursuant to his execution levy, after due advertisement, has the officer holding execution to sell the premises at public vendue, and the same was bought by B's attorney and the wife of B, to whom a deed was made, and the bid credited on the execution; no money was paid by purchaser. Was the levy void when made? If not would it be sufficient to support the sale and sheriff's deed? J. W. J.

Denton, Tex.

Answer. The levy of the execution upon the homestead of "A," said homestead then being occupied by "A" and his family, was absolutely void, and the sale by the sheriff under said levy conveyed no title. S.

Query 29. [16 Cent. L. J. 278.] A made the following will: "I hereby will, bequeath or give E S, wife of J S, all my right, title and interest (after my death and after my debts shall have been paid) in all my real estate and appurtenances belonging thereto, located, etc.; also all my personal property and effects, to have and to hold the same as her exclusive right and title, for her benefit and for the benefit of her children." E S was a neice of the testator, and had children living at the time of his death, who, with herself and children born since the death of the testator, are now living. The property devised consisted almost exclusively of valuable real estate. What interest does E S take under the will? What interest do the children take, if any? What distinction between those born before and those after the execution of the will? X.

Martins Ferry, O.

Answer. E S, the wife of J S, under the terms of the will, takes a life estate only in the real estate with the remainder over to her children then or thereafter born. S.

LEGAL EXTRACTS.

The following letter was addressed by the Lord Chief Justice to the Committee of Arrangements of the Bar Association of the State of New York, in answer to an invitation to be present at the association's next annual meeting:

GENTLEMEN:—Your letter of January 31 has just reached me. Allow me to offer you, and through you to the bar of New York, my grateful thanks for the invitation which it contains. I acknowledge in that invitation a striking mark of the kindly feeling entertained by the lawyers of a great American State toward the lawyers of England, engaged as we are in the common practice of a common profession, and bound by a law in many respects the same. It is matter of regret to me that the distinction you confer, and the kindness you offer, should be conferred and offered in regard of one who unaffectedly feels his entire unfitness to represent the great traditions of a body, of which he chances to be the highest nonpolitical member; but as I can not look upon the compliment as personal, so neither ought personal considerations to influence me in accepting or declining it. I do not feel free to refuse an invitation so cordial and generous as yours, and I accordingly accept it and thank you for it. Two things only further it is fit that I should say; my public duties make it impossible for me to leave England before August 10 or 12, a time which I fear may de inconvenient to you, but as to which the duties of my office leave me no choice. Lastly, I am obliged to add, that since an illness with which I was visited in November, I have not regained my health and strength; and it is therefore possible, though I hope not likely, that I may be unable, from want of strength, to undertake the visit. Should I be unhappily prevented from coming from this cause (no other will prevent me), I need not say I will give you the timeliest notice in my power.—I am, gentlemeh, with great respect, your obliged and obedient humble servant,

COLERIDGE.

1 Sussex Square, London, W.,
February, 10, 1883.

The invitation to the Chief Justice will be taken by the legal profession in England as a compliment to English lawyers. The profession do not share Lord Coleridge's doubts, but are confident that he will fitly and gracefully represent them beyond the Atlantic, and wish him health to undertake the visit, and a prosperous voyage out and home—safe even from the perils of interviewing, which ordeal few will know better how to encounter.—*Law Journal.*

NOTES.

——A certain lawyer of this city, well known for his power of repartee, had been down to Salina to try a case. Returning to the town the conductor was very impertinent in his manner because the lawyer was rather tardy in producing his ticket when called for to be punched. Somewhat ruffled, the lawyer remarked to a friend next to him: "The Southern Pacific shall never see a cent of my money after this." "Going to foot it up and down from now on, eh?" sneered the conductor. "Oh, no," replied the lawyer quietly, "instead of buying my ticket at the office I shall pay my fare to you."—*Virginia City Enterprise.*